Citation: *LP v Canada Employment Insurance Commission*, 2023 SST 720

Social Security Tribunal of Canada
General Division – Employment Insurance Section

Decision

Appellant:	L. P.
Respondent:	Canada Employment Insurance Commission

Decision under appeal:	Canada Employment Insurance Commission reconsideration decision (562230) dated January 3, 2023 (issued by Service Canada)

Tribunal member:	Suzanne Graves
Type of hearing:	Teleconference
Hearing date:	April 21, 2023
Hearing participant:	Appellant
Decision date:	June 09, 2023
File number:	GE-23-239

Decision

[1] The appeal is allowed in part.

[2] The Appellant has shown that she was available for work from January 30, 2022, to April 30, 2022. This means that she isn't disentitled from receiving Employment Insurance (EI) benefits for that period.

[3] The Appellant hasn't shown that she was available for work after April 30, 2022. This means that she can't receive EI benefits from May 1, 2022.

Overview

[4] The Canada Employment Insurance Commission (Commission) decided that the Appellant couldn't get EI regular benefits as of January 30, 2022, because she wasn't available for work. A claimant must be available for work to get EI regular benefits. Availability is ongoing. This means that a claimant has to continue searching for a job.

[5] I must decide whether the Appellant has proved that she was available for work. The Appellant has to prove this on a balance of probabilities. This means that she has to show that it is more likely than not that she was available for work.

[6] The Commission says that the Appellant wasn't available because she prioritized her childcare responsibilities and was only looking for part-time work.

[7] The Appellant disagrees and states that she never told the Commission she was not ready, willing and able to work. She argues that she was always available for either a full-time or part-time job with flexible hours.

Matter I have to consider first

I will accept the documents sent in after the hearing

[8] After the hearing, the Appellant sent in documents related to her job search activity. I accepted the documents as they are relevant to the issue raised in this appeal. I sent the documents to the Commission and gave it time to respond. The Commission made arguments in reply.

Issue

[9] Was the Appellant available for work from January 30, 2022?

Analysis

[10] Two different sections of the law require claimants to show they are available for work. The Commission decided that the Appellant was disentitled under both sections.

[11] First, the *Employment Insurance Act* (EI Act) says that a claimant has to prove that they are making "reasonable and customary efforts" to find a suitable job.[1] The *Employment Insurance Regulations* (Regulations) give criteria that help explain what "reasonable and customary efforts" mean.[2]

[12] Second, the EI Act says that a claimant has to prove that they are "capable of and available for work" but aren't able to find a suitable job.[3] Case law gives three things a claimant must prove to show that they are "available" in this sense.[4] I will look at those factors below.

[13] The Commission decided the Appellant couldn't receive benefits because she wasn't available for work based on both sections of the law. It says that the Appellant was not available for full-time work because of her childcare responsibilities.

[14] There is no evidence that the Commission asked the Appellant for more details about her efforts to find work or gave her the chance to expand her job search before disentitling her to benefits. So I will make no decision on a disentitlement under section 50 of the EI Act for failing to carry out a reasonable and customary job search.[5]

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[1] See section 50(8) of the *Employment Insurance Act* (EI Act).
[2] See section 9.001 of the *Employment Insurance Regulations* (Regulations).
[3] See section 18(1)(a) of the EI Act.
[4] See *Faucher v Canada Employment and Immigration Commission*, A-56-96 and A-57-96.
[5] I agree with the reasoning in the Tribunal's Appeal Division's decision in *LD v Canada Employment Insurance Commission*, 2020 SST 688. In that decision, the Tribunal decided that the Commission cannot disentitle a claimant under section 50(8) of the EI Act without first requiring the claimant to provide proof of reasonable and customary efforts to find work. So, I will make no finding under section 50(8) and will only look at whether the Appellant was available for work under section 18(1)(a) of the EI Act.

[15] I will now consider the law myself to determine whether the Appellant was available for work.

Capable of and available for work

[16] Case law sets out three factors for me to consider when deciding whether the Appellant was capable of and available for work but unable to find a suitable job. The Appellant has to prove the following three things:[6]

a) She wanted to go back to work as soon as a suitable job was available.

b) She made efforts to find a suitable job.

c) She didn't set personal conditions that might have unduly (in other words, overly) limited her chances of going back to work.

[17] When I consider each of these factors, I have to look at the Appellant's attitude and conduct.[7]

Wanting to go back to work

[18] The Appellant testified that she wanted to work. She testified in a sincere and straightforward manner and showed that she made some job applications. I find that she has shown that she wanted to go back to work as soon as a suitable job was available.

Making efforts to find a suitable job

[19] I considered the list of nine job-search activities set out in the Regulations in deciding this second factor. For this factor, that list is for guidance only. Some examples of those activities are the following:[8]

- preparing a resumé or cover letter

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[6] These three factors appear in *Faucher v Canada Employment and Immigration Commission*, A-56-96 and A-57-96. This decision paraphrases those three factors for plain language.
[7] Two decisions from case law set out this requirement. Those decisions are *Canada (Attorney General) v Whiffen*, A-1472-92; and *Carpentier v Canada (Attorney General)*, A-474-97.
[8] See section 9.001 of the Regulations.

- registering for job search tools or with electronic job banks or employment agencies
- assessing employment opportunities
- applying for jobs[9]

[20] The Appellant testified that, after leaving her job, she prepared a resumé and cover letters. She signed up for daily alerts through the government jobs site and regularly reviewed available openings to assess opportunities. She searched for part-time or full-time jobs online and applied for suitable work in the areas of sales, marketing, and design.

[21] I allowed time after the hearing for the Appellant to provide any relevant records related to her job search activities. Her post-hearing documents[10] show that she:

- signed up on the Government of Canada job bank, and to receive job alerts on LinkedIn
- received job alerts in February, March and August 2022, as well as other undated alerts for jobs in the fields of advertising, marketing and public relations
- applied for a Virtual Travel Experience Counselor position in February 2022
- applied for a Market Manager position in March 2022
- applied for a part-time Reservation Sales Specialist position in April 2022
- applied for a position as a Social Creator Sourcer (undated)

[22] I considered the Appellant's testimony and reviewed her job search records. I accept her sworn evidence that, after leaving her job, she took time to prepare a resumé and cover letters, and regularly reviewed and assessed suitable job openings using online search tools. She also showed that she applied for jobs between February and

[9] I am not bound by the list of job-search activities in deciding this second factor. Here, I can use the list for guidance only.
[10] The Appellant's job search records send in after the hearing are at GD5.

April 2022. I find that the Appellant has shown that she made enough efforts to meet this second factor between January 30, 2022, and April 30, 2022.

[23] The Appellant didn't show that she made efforts to find work after April 2022. She says that she is unable to locate many of her job search records, as they were deleted after one year. But I note that the application for EI benefits she completed on February 9, 2022, sets out expectations for job search activities and advises claimants to keep a record of their efforts to find suitable employment for six years.[11]

[24] As stated above, the Appellant doesn't have to prove she made reasonable and customary efforts to find work. But she must show that her job search efforts were ongoing. She must prove that she continued to actively search for work.

[25] The Appellant showed that she made sufficient efforts to meet this second factor from January 30, 2022, to April 30, 2022. She didn't prove that she made efforts to find work after April 30, 2022, so she does not meet the second factor from May 1, 2022.

Personal conditions

[26] The Commission argues that the Appellant put personal conditions on her job search because she had to care for her children to during regular business hours. It says that a claimant who restricts their availability to irregular hours due to the lack of childcare has not proved their availability under s.18(1)(a) of the EI Act. The Appellant left her previous employment to care for her children, so it says that she prioritized her childcare responsibilities over her availability for work.[12]

[27] The Commission filed a copy of the Appellant's application for benefits, and records of its three discussions with her in February, May and December 2022.[13] The Appellant told officers that she had childcare responsibilities, and so looked for part-time

[11] This part of the Appellant's EI benefits application is at GD3-15 to 16.
[12] The Commission makes this argument at GD4-3.
[13] The Appellant stated on her application for benefits that she was looking a "more part time" job (GD3-12). The Commission's notes of its discussions with the Appellant are at GD3-22, GD3-23, and GD3-33.

work in the afternoons and evenings, when her spouse was home to care for the children. She also said that she was on several daycare waitlists.

[28] The Appellant says she put no personal conditions on her search. She testified that from January until October 2022, she had no daycare, so she needed to find work with flexible hours. From November 2022, a family member was available to help with childcare.

[29] The Appellant says that the Commission didn't properly record her statements to its officers. She says that she was always ready, willing and able to work at a full-time or part-time job as long as the hours were flexible enough for her to balance her childcare responsibilities. She acknowledges that she left her previous position because it conflicted with her childcare obligations but testified that the hours at that job were not at all flexible. She testified that she had previously worked for several years in a full-time office manager position with flexible hours.

[30] I considered a recent decision of the Tribunal's Appeal Division (AD), *SA v Canada Employment Insurance Commission*[14] In *SA*, the AD stated that a claimant is only required to look for suitable work, and that if certain work requires hours that are incompatible with their family obligations or religious beliefs, the law says that work is not suitable.[15]

[31] A restriction in hours due to childcare obligations is not always a personal condition. The AD held in *SA* that it is an error in law to not consider whether a restriction in hours is due to family obligations within the meaning of s.9.002(1)(b) of the Regulations.

[32] Availability is a fact to be determined based on all the circumstances, including for example, a claimant's work history, and whether they were making active efforts to find childcare.

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[14] 2022 SST 1490.
[15] See section 9.002(1) of the Regulations.

[33] In *SA*, the claimant's working hours outside the home were restricted for about six months. But the AD considered the fact that the claimant made ongoing efforts to find childcare and was available for remote work. It decided that non-remote work beyond those hours was not suitable work for her because of her childcare obligations.

[34] While s. 9.002(1)(b) of the EI Act introduces flexibility in the hours or schedule a claimant might be available to work, the AD confirmed that ultimately, a claimant must still prove their availability to work for every working day.[16]

[35] In the Appellant's case, she couldn't take work outside her home during all regular business hours due to her childcare responsibilities until November 2022. But she testified that she had previously worked at a full-time job with flexible hours and was available to take similar work again. She also worked remotely for a previous employer.

[36] I accept the Appellant's testimony, supported by her previous statements to the Commission, that she was actively searching for daycare options. She showed that she was available for flexible remote work from home, and that she has a history of working at a full-time job with flexible hours.

[37] Taking all of the Appellant's circumstances into account, I find that she didn't put personal conditions on her job search that would unduly limit her chances of returning to work.

So, was the Appellant capable of and available for work?

[38] Based on my findings on the three factors, I find that the Appellant has shown on the balance of probabilities that she was capable of and available for work but unable to find a suitable job from January 30, 2022, to April 30, 2022.

[39] The Appellant hasn't proved that she was available for work from May 1, 2022, because she did not show that she was continuing to search for work.

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[16] See section 18(1)(a) of the EI Act.

Conclusion

[40] The Appellant has shown that she was available for work within the meaning of the law from January 30, 2022, to April 30, 2022. This means that she is not disentitled from receiving benefits for that period.

[41] The Appellant has not shown that she was available for work after April 30, 2022. Because of this, I find that the Appellant can't receive EI benefits from May 1, 2022.

[42] This means that the appeal is allowed in part.

Suzanne Graves
Member, General Division – Employment Insurance Section